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No. 395.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO PETITION.

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THOMAS M. FIELDS, PLAINTIFF IN ERROR,
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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The petitioner and plaintiff in error, Thomas M. Fields, was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. The defendant demurred to each of the eight counts of the indictment (Rec., p. 2), and the demurrer was sustained as to counts 4, 5, 7, and 8, and was overruled as to counts 1, 2, 3, and 6 (Rec., p. 4).

The defendant then pleaded not guilty; his trial was begun on May 8, 1905, and on May 15 he was convicted under the third count and acquitted under counts 1, 2, and 6. (Rec., p. 18.)

He moved in arrest of judgment (Rec., p. 19) and for a new trial (Rec., p. 20), and these motions being overruled, he was sentenced, on July 28,

1905, to be imprisoned and kept at labor in the penitentiary for five years. (Rec., p. 26.)

He appealed to the Court of Appeals of the District of Columbia, which modified the judgment of the Supreme Court of the District of Columbia by striking out the words "at labor," and, as so modified, affirmed it. (27 App. D. C., 433; Rec., pp. 75–85.)

Petitions for a rehearing and for the allowance of a writ of error having been denied by the Court of Appeals, a writ of error was sued out from this court, and a motion to dismiss the same is pending.

He has also filed a petition for a writ of certiorari to the Court of Appeals of the District of Columbia. The record of the Court of Appeals has been certified under the writ of error and has been printed and filed.

ARGUMENT.

The power of this court to issue its writ of certiorari to the Court of Appeals of the District of Columbia is found in section 234 of the District of Columbia Code (31 Stat., 1189, 1227), which reads as follows:

> In any case heretofore made final in the court of appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court.

The Court of Appeals of the District of Columbia was created, as were the Circuit Courts of Appeals, for the purpose of relieving this court of the oppressive burden of general litigation.

Forsyth v. *Hammond*, 166 U. S., 506.
In re Woods, 143 U. S., 202.

But in order to secure uniformity of decision, and to obviate any injurious results that might follow if an absolute finality of determination were given to the court of appeals, the right of review by certiorari was reserved to this court.

This court has uniformly held that its power in certiorari is one which should be sparingly exercised, and only when the circumstances of the case satisfy the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of the Nation in its internal or external relations, demands such exercise. (*Forsyth* v. *Hammond*, *supra; Lau Ow Bew*, *Petitioner*, 141 U. S., 583, 587; *In re Woods*, *supra; Lau Ow Bew* v. *U. S.*, 144 U. S., 47, 58; *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U. S., 372, 383.)

This court has recently denied petitions for certiorari to the Court of Appeals of the District of Columbia in the following cases:

Benjamin F. McCaully, *Petitioner*, v. *The United States* (contempt of court, sec. 725, R. S., U. S.), 198 U. S., 586; *Albert M. Ray-*

mond, Petitioner, v. *The United States* (Libel, sec. 815, Dist. Code), 200 U. S., 619; *Taylor Knoll, Petitioner* v. *The United States*, 201 U. S., 643; and in numerous civil cases.

Neither the petition not the record in this case presents any new question, or question of general importance. The case was brought under a purely local law, having no application outside the District of Columbia.

The third count of the indictment, under which the petitioner and plaintiff in error was convicted, charges that on November 23, 1903, he and another were receivers under an order of the Supreme Court of the District of Columbia entered November 6, 1894, in an equity cause then pending in said court; that on said November 23, 1903, the receivers had possession of $15,974.07 which had come into their possession by virtue of their office and employment as such receivers; and that on said November 23, 1903, they embezzled the same. (Rec., pp. 1, 2.)

The indictment was brought under section 841 of the District of Columbia Code, which is as follows:

> SEC. 841. Executors and other fiduciaries—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own

> use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both. (Effective Jan. 1, 1902.)

Petitioner claims that the primary question of controlling importance in the case is whether the trial court had jurisdiction—that is, whether or not the statute (sec. 841, District Code), denouncing embezzlement by a receiver, relates to property coming into the possession of the receiver before but embezzled after its enactment.

The question is one of construction, and the statute—one of purely local application—has been construed by both local courts, the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia. It has not been nor can ever be construed by the courts of other jurisdictions; consequently, there is neither the existence nor the possibility of conflict between the inferior Federal courts upon this question of construction.

The question is undoubtedly of great importance to the petitioner, for a different construction would have permitted him to go unwhipped of justice for thefts which were proven with mathematical certainty. But it is not a question of general impor-

tance. Indeed, it is hardly possible that it can arise again, even in the District of Columbia, because of the time which has elapsed since the enactment of the statute.

The Court of Appeals, after a discussion of section 841 and of cognate sections relating to embezzlement, says (Rec., p. 78):

> It is inconceivable that Congress intended to make a distinction in respect of property thereafter embezzled, dependent upon the time when the same shall have come into the possession of the embezzler. There is no possible foundation in law or morals for such a distinction, and unless compelled by an unmistakable expression of such an intention, no court would be justified in adopting a construction that would give it recognition. "Nothing is better settled than that statutes are to receive a sensible construction, such as will effect the legislative intent, and, if possible, so as to avoid or reject an absurd conclusion." (Lau Ow Bew *v.* U. S., 144 U. S., 47, 59.)
>
> With one exception, none of the multitude of cases cited in appellant's brief covers the particular phase of statutory construction here presented. All are distinguishable, and it is unnecessary to consume space by their separate review. The exception referred to is the decision of an inferior court of another jurisdiction unofficially reported.
>
> We are of the opinion that the learned trial justice did not err in holding that sec-

> tion 841 comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect, when embezzled thereafter.

In the case of *Bolles* v. *Outing Company*, 175 U. S. 262, cited on the petition at page 5, this court said (p. 265):

> The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. *In both cases it will endeavor to effect substantial justice.* (*United States* v. *Hartwell*, 6 Wall., 385; *United States* v. *Wiltberger*, 5 Wheat., 76, 95; *American Fur Company* v. *United States*, 2 Pet., 358; *United States* v. *Reese*, 92 U. S., 214.)

The petitioner claims that the decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit upon the question of the right of the defendant to an instruction on good character in the absence of evidence as to character or reputation. The case of *Mullen* v. *United States*, 106 Fed., 892, decided by that court, is cited in support of the doctrine that in a criminal trial in a Federal court, where no testimony has been offered as to the previous

character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.

But this broad question was not presented to the Court of Appeals in this case, the question being upon a refusal of a specific prayer offered by the defendant in the trial court, which is set out in the record at page 63, and is quoted by the Court of Appeals in its opinion, as follows (Rec., p. 83):

> (4) Among the refused prayers of the defendant is the following: "The law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in the consideration of the evidence." The defendant offered no evidence of good character. Assuming that he was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon, the one offered went much farther than that, for it requires in addition that he shall be presumed to be "an upright, honest man of integrity," also, throughout the consideration of the evidence.

Petitioner urges this court to decide a question which has never been in issue.

Statements in the petition concerning the offer of the series of 27 prayers are not supported by the record. Whatever question may have existed as to the refusal of the trial court to pass upon the series of prayers was eliminated by the subsequent presentation and consideration, and the granting or refusing, of each of said prayers separately.

It is further claimed by petitioner and laid down as a question of general importance that the trial court erred in receiving evidence of 92 separate items, each claimed to be in itself a substantive act of embezzlement and received in evidence as such, under the indictment alleging but a single act on one certain date.

The following extract from the general charge of the trial justice (Rec., p. 69) shows that the jury was fully, carefully, and correctly instructed as to its duty in considering this evidence:

> Respecting a point which was touched upon by the district attorney—although this indictment charges the defendant with having embezzled the sum of $15,974, it is not essential that the proof should go so far as to make out that particular sum, and inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in your dealing with those various items:
>
> If you find from the evidence that after January 1, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived plan, then you would be justified in finding him guilty concerning all the embezzlements that you find the proof makes out; but if you find that there was not such a plan pre-

> conceived by him before a first embezzlement, and conclude from the evidence that each conversion by him, if there was a fraudulent conversion by him, was in itself distinct from every other, if there were other fraudulent conversions, then you would only be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree. But in determining, in that aspect of the case, the question of his guilt upon a particular conversion, you will be entitled to take into consideration evidence which you find proves other conversions of the same fund; but only as tending to aid you in coming to a conclusion upon the question of intent—if you find he converted an item in question, whether or not you believe that the conversion of that particular item was done with fraudulent intent.

The question raised by petitioner as to whether section 860 R. S., applies to the Supreme Court of the District of Columbia was not raised in the trial court, but was first raised in the Court of Appeals, in petitioner's brief and assignments of error.

Many of the claims in the petition have no foundation in the record.

The statements in the petition that petitioner was "simply railroaded to trial and infamous conviction" (Pet., pp. 1, 2), and that the trial "was actually in progress only eighteen hours, and was practically an *ex parte* trial of the Government's

case" (Pet., p. 12), are not supported by the record, which shows that the indictment was filed April 3, 1905 (Rec., p. 1), a demurrer was filed April 20 (Rec., p. 2), and was partially sustained and partially overruled April 28 (Rec., p. 4); that divers motions were filed by the defendant on May 3, 4, and 8 (Rec., pp. 7, 9, 10); that the trial was commenced on May 8 (Rec., p. 8), and was concluded by verdict of conviction May 15 (Rec., p. 18); that motions for new trial and in arrest of judgment were filed, considered, and overruled (Rec., pp. 19, 20, 26); that sentence was imposed on July 28, 1905 (Rec., pp. 26, 27), and that the defendant called witnesses and offered testimony, but did not testify himself (Rec., pp. 54, 56).

The statement in the petition (p. 8) "that the defendant's counsel handed up twenty-seven separate prayers, each on a separate sheet of paper, lightly held together with a mere temporary slip fastener," and the other statements in the petition concerning the offer and rejection of these prayers (pp. 8, 9) are not supported by the record, and misrepresent the facts as they appear in the record at page 57. As pointed out above, the prayers offered in series were subsequently considered and passed upon separately, except four, which were abandoned by the defendant.

The statement in the petition at page 14, that petitioner and his counsel were denied inspection

of certain public records, is misleading and is not supported by the record, which shows at pages 28 and 29 the following (from the bill of exceptions):

> * * * It appeared by agreement of counsel that upon last Thursday the United States attorney had invited the defendant and his attorney to examine the papers at any time in his office. The United States attorney states that he needs the papers in evidence and that counsel or defendant will be given them in any place where their loss will be guarded against. * * *
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> * * * * *
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> The COURT. My desire is not to subject the papers to loss. If counsel will designate any particular papers that they want to obtain copies of or inspect, so that the district attorney may keep track of the papers, that may be done; the counsel may examine the papers, as the district attorney suggests, at any time they want; but I do not think counsel ought to take such an assortment of papers out of the custody of the district attorney.

* * * * *

In many other respects statements in the petition as to what the record shows are untrue and misleading in that they contain only part of the truth.

In conclusion, it is submitted that this is an ordinary criminal case, involving the construction and application of a purely local law, and that all

the questions involved have been passed upon already by two courts.

No question appears of such peculiar or general importance as to justify this court in issuing the writ of certiorari. It is submitted that the petition should be denied.

HENRY M. HOYT,
Solicitor-General.

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